Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
	)	
High-Cost Universal Support	)	WC Docket No. 05-337
	)	
Developing an Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Lifeline and Link-Up	)	WC Docket No. 03-109

COMMENTS OF CORE COMMUNICATIONS, INC. ON NPRM
& REPLY COMMENTS ON SECTION XV OF NPRM

Core Communications, Inc. ("Core") respectfully submits these comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") released on February 9, 2011 (FCC 11-13) in the above-referenced dockets, as well as reply comments in response to comments filed on April 1, 2011 relative to Section XV of the NPRM.

I. COMMENTS ON NPRM

Comments on Section X ("INTERCARRIER COMPENSATION FOR A BROADBAND AMERICA")

In setting forth its reasons for reforming the current intercarrier compensation ("ICC") regime, the Commission posits that "the system is based on outdated concepts and a per-minute rate structure from the 1980s that no longer matches industry realities. *NPRM*, ¶ 495. While the present ICC system is outdated in some respects, the Commission should not overlook the fact that it does serve a valuable ongoing function. The ICC system, when properly enforced, ensures that when two or more network providers collaborate in the completion of a call, and the retail end user does not pay each of those providers, all of them will nevertheless receive fair compensation for their respective work in providing the end-to-end service. This is an important keystone to ensuring that telecommunications services are competitive. The Commission's call blocking rules require terminating carriers to complete all calls they receive, regardless of actual compensation. However, if a carrier's network is used without adequate compensation as a result of FCC rate prescription, there is an unconstitutional takings. In addition, inadequate compensation leads to abuses in the form of overuse of terminating carrier networks by originating networks.

Not all ICC is subsidy, yet the NPRM seems to presume that is the case. Both access and reciprocal compensation serve to ensure lawful, predictable, and economic recovery of costs by carriers. While certain rates may be due for reform (as the Commission appears to acknowledge), eliminating—or "transforming"—the current ICC system, without any clear view of its successor, is far more likely to exchange one set of problems into another rather than it is to resolve the issue in a manner that is fair, equitable and efficient for all. Indeed, continuing to characterize the current ICC system in conclusory and pejorative terms such as "byzantine" and "broken" actually serves to undermine compliance with the current ICC system and the rule of law.

As an additional basis for reform, the Commission states that "technological advances have caused… local exchange carriers' compensable minutes to decline." *Id.,* thereby shrinking the scope of the ICC system. If this is an impetus, then the Commission's goal should be to stabilize and enforce payment obligations as the current system fades away; not to further destabilize an already weakened patient. While it is promising that the Commission recognizes the need for a "framework for a stable, predictable transition to a new system," *Id.*, unfortunately, the *NPRM* appears to unfairly indict the entire existing ICC system. Without any factual basis or support, it posits that "because most intercarrier compensation rates are set above incremental cost, they create incentives to retain old voice technologies and engage in regulatory arbitrage for profit." *Id*. This conclusion overlooks the fact that that PSTN carriers—primarily ILECs—are retaining "old voice technology" precisely *because* the decline in voice minutes that has been taking place over the past decade has resulted in growing quantities of excess switching capacity whose replacement with IP technology cannot be economically justified.

As the Commission observes, *NPRM*, ¶ 503 and Figure 13, switched access minutes peaked at roughly 550-billion in 2000 and by 2008 had plummeted to just above 300-billion. This rapid drop-off in switched access demand was compounded by a precipitous drop-off in dial-up ISP-bound minutes over the same period. The result is massive amounts of excess switched service capacity, the costs of which are largely sunk. Hence, there is little economic justification for tossing this in-place and perfectly serviceable capacity aside merely because IP exists as a technological substitute. Indeed, when viewed in the context of our current national economic recession and budgetary crisis, unnecessary replacement of these assets is antithetical to our national interests and to our economy generally.

Due to the disparate treatment of voice-over-Internet protocol ("VoIP") and time-division multiplexing ("TDM") for ICC purposes, there has never even been a market-driven, level playing field test of these two alternative voice telephony technologies. No one knows for certain that VoIP is actually more efficient than TDM, as the *NPRM* appears to presume.[1] However, what is certain is that using existing TDM capacity whose costs are sunk is more efficient than incurring new capital investment costs to replace these assets. There are, to be sure, numerous problems in the existing ICC system that must be addressed and resolved, but not for the purpose of incenting carriers to make investments that serve no valid economic purpose. Indeed, "transforming" the existing ICC regime so as to incent carriers to prematurely and unnecessarily abandon their TDM assets seems antithetical to the Commission's overarching goals and those of the 1996 Act.

The *NPRM* further concludes that the "current [ICC] system is not sustainable in an all-broadband Internet Protocol (IP) world where payments for the exchange of IP traffic are not based on per-minute charges, but instead are typically based on charges for the amount of bandwidth consumed per month." *NPRM*, ¶ 505. Here, the *NPRM* mixes apples and oranges. ICC comes into play where telecommunications carriers exchange telecommunications traffic. ICC in no way impacts, or is impacted by, the way in which non-regulated IP carriers exchange traffic or price IP bandwidth. It is not rational to engraft pricing structures from the IP world onto the PSTN and expect the PSTN to conform to those structures. Indeed, there is no discussion in the NPRM of how a "bandwidth consumed per month" structure could be imposed on the PSTN, or why that result would be desirable. In short, the NPRM's observation on pricing of IP services

[1] Voice traffic transmitted via TDM facilities requires 64 kbps of bandwidth capacity. To achieve the same voice quality using a 64 kbps CODEC with VoIP technology required 87.2 kbps of bandwidth capacity, i.e., about 36% more. *See*, Cisco Systems, "Voice Over IP – Per Call Bandwidth Consumption," available at: http://www.cisco.com/en/US/tech/tk652/tk698/technologies_tech_note09186a0080094ae2.shtml

conflates wholesale and retail practices and ignores fundamental technological and cost differences between IP and TDM networks.

Retail vs. Wholesale. At the retail level, VoIP telephony service is offered through an array of pricing plans that include both per-minute and flat-rate arrangements. Retail broadband services are priced based upon maximum data transmission rates, either on a "best efforts" basis or on a guaranteed "Service Level Agreement" ("SLA") basis. The VoIP service may or may not be provided by the same entity that furnishes the customer's broadband Internet access connection. Retail pricing of consumer mass market broadband services is typically most sensitive to the data transmission speed or data rate, with increasingly higher flat monthly rates applying for services offering increasingly higher, best efforts transmission speeds. Wireless broadband services are subject to block-of-use pricing based upon the aggregate number of megabits sent and received during a given billing cycle. Some wireline broadband providers are introducing block-of-use pricing for their services as well, albeit at considerably greater use limits than is typical for wireless carriers. This inherent separation of "access" (including IP bandwidth) and voice telephony usage is fundamentally different from the way in which PSTN services are typically furnished, where "access" and "transport" are bundled and provided to the retail customer by the same carrier.

The bottom line is that the retail pricing arrangements associated with VoIP at the retail level do not mirror the wholesale pricing associated with the underlying exchange of traffic. For example, while ISPs typically offer their mass market customers "best efforts" data rates that are not guaranteed, they typically purchase transport connecting their local servers to "peering points" within the Internet "cloud" where traffic is exchanged with other networks at guaranteed data rates subject to an SLA. Such transport "pipes" are typically provided to the ISP on the

basis of their transmission bandwidth *capacity* (e.g., OC-3, E-100) and are not priced on the basis of the aggregate number of bits actually transmitted.

Retail pricing of PSTN services reflects a century-plus tradition of "sender-pays" pricing. Under a sender-pays regime, the caller pays for the entire call, from the point of origin to the point of termination. And because the entire call is paid for by the calling party, there is no usage-based charge to the recipient for delivery of the inbound call. A similar type of sender-pays pricing is also used in numerous other situations in which two or more parties receive some benefit from a transaction initiated by only one of them. A particularly good example can be found in the pricing model used by the Postal Service and other package transport and delivery carriers. The practice offers transactional simplicity because the charge for the service is imposed only once for each call, letter, package or other similar service. Plus, while both parties may derive some benefit from the telephonic or physical communication, the action of initiating the call or mailing the letter is, for the most part, within the control of the sender. On those occasions where the recipient determines that it is in its financial interest to pay for the service, reverse-charge billing (i.e., recipient-pays) is available as an option that the recipient is free to elect, such as toll-free (800-type) calling services, or postage-paid Business Reply Mail.

Importantly, the decision whether the charge for a telephone call or for the shipment of a package would be borne by the sender or the recipient lies entirely within the control of the end users of the service, and not the service provider or any regulator. Vendors offering merchandise over the phone or via the web may recover the shipping cost directly through a "shipping charge" added to the price of merchandise; they may absorb the charge entirely (i.e., "free shipping") and, in effect, bundle the shipping cost within the stated purchase price; or they may recover shipping costs in some other manner. For example, Amazon offers customers the option of

subscribing for "Amazon Prime" service at a price of roughly $80 per year, which provides the customer with second-day delivery of merchandise without additional charge.)

Contrast this array of options in an open, competitive industry with the Commission's prescription of the $0.0007 per MOU termination rate for ISP-bound intercarrier calling, or the *NPRM*'s proposed adoption of bill-and-keep in lieu of any cash ICC mechanism. In both of these cases, the Commission requires the terminating carrier to look to its own customer for payment,[2] rather than letting the market determine how such recovery will take place. It also assumes that the terminating carrier possesses a sufficiently large and diverse customer base that will pay enough additional revenue for the carrier to recover these costs.

PSTN vs. IP Operating Parameters. The PSTN employs a circuit-switched architecture in which a physical or logical transmission path is established between caller and recipient that exists for the duration of the call, regardless of whether actual conversation is taking place. Thus, the PSTN resources—switching, transmission path—are dedicated to a specific call and are not available to support any other use. It is for this reason that PSTN services are typically subject to some form of duration-based pricing. The *NPRM* correctly notes that in the case of IP, traffic is measured in terms of bits transmitted rather than duration. Most existing peering arrangements among Tier 1 Internet Backbone Providers (IBPs) are premised upon reasonably, if not precisely, balanced traffic. Significantly, however, VoIP traffic, although intermixed with other IP traffic, actually embodies cost attributes that are not all that different from those that control PSTN operation.

VoIP transmission, like TDM, requires periodic sampling of the analog voice signal for conversion into digital form. Where TDM involves the assignment and dedication of a specific

[2] *ISP Remand Order*, FCC 01-131, at ¶ 83.

"time slot" in the synchronous TDM bit stream, VoIP traffic is transmitted asynchronously in packets. However, because the voice conversation must be continuously sampled for the full duration of the call, the number of bits involved for a given call duration is not dependent upon whether actual conversation is taking place. Put differently, there is a direct and predictable relationship between the duration of a VoIP call and the number of bits that will be transmitted—in both directions—over the Internet or other IP transmission facility. Additionally, in the case of interconnected VoIP (i.e., VoIP traffic that either originates or terminates on the PSTN) the resources involved in the PSTN end of the call are, like any other PSTN traffic, duration-sensitive. As such, there is nothing inherently unreasonable or invalid about using a duration-based pricing model—retail or wholesale—for VoIP traffic.[3]

Comments on Section XI ("LEGAL AUTHORITY TO ACCOMPLISH COMPREHENSIVE REFORM")

In Section XI, the Commission outlines the statutory bases upon which it intends to structure ICC reform. First, the Commission states that "reducing interstate access charges falls well within our general authority to regulate interstate access under sections 201 and 251(g)." *NPRM*, ¶ 510. Yet, the Commission should bear in mind that Section 201 provides for Commission review of rates; it is not a freestanding "ratemaking" provision. While section 201 enables the Commission to ensure that "charges, practices, classifications, and regulations" are "just and reasonable," the Commission's authority to prescribe actual rates arises under section

[3] Duration-based pricing for voice telephone calls has the additional benefit of being understandable to the consumer. The consumer can relate to a charge expressed in minutes, since that is how he or she would measure and understand the service being purchased. Using the G.711 (64 kbps) CODEC, which provides VOIP voice quality that is equivalent to TDM, Cisco estimates that the Ethernet bandwidth required to carry these VOIP packets is 87.2 kbps. http://www.cisco.com/en/US/tech/tk652/tk698/technologies_tech_note09186a0080094ae2.shtm. If charges to retail customers were based upon bandwidth rather than duration, a 5-minute call would be charged on the basis of 26.16 mb of data transmission volume.

205. Importantly, section 205 provides that the Commission may prescribe rates only after a hearing:

> Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge… 47 U.S.C. § 205(a).

To comply with section 205, the Commission must conduct ratemaking hearings to support the rates it intends to prescribe in connection with its ICC reform plans. Meanwhile, Section 251(g) is simply a "grandfather" clause; it provides no independent ratemaking authority.

The Commission's conclusion that it "has authority to supersede all access charge obligations preserved by section 251(g), including intrastate access requirements, by adopting rules to implement the reciprocal compensation requirements of section 251(b)(5)," *NPRM*, ¶ 514, is highly suspect, since section 251(g) is simply a grandfather clause. It preserves the Commission's pre-1996 Act authority over the interstate access regime. It does not, alone or in conjunction with any other provision, grant the Commission authority over intrastate access obligations administered by state commissions pursuant to state law. The Commission did not enjoy authority over intrastate access regimes prior to the 1996 Act and therefore such authority cannot have been grandfathered by section 251(g).

The Commission postulates that it might have authority to impose a "bill-and-keep methodology" pursuant to sections 251(b)(5) and 252(d)(2)(B)(i) of the Act. *NPRM*, ¶ 516. While section 252(d)(2)(B)(i) references "bill-and-keep," the Act contemplates that any such "arrangements" shall ensure "the mutual recovery of costs through the offsetting of reciprocal obligations." 47 U.S.C. § 252(d)(2)(B)(i). Similarly, section 252(d)(2)(A), the provision which

precedes 252(d)(2)(B) and as to which 252(d)(2)(B) merely sets forth "rules of construction," requires that:

> [A] State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless—(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls."

Any "bill-and-keep methodology" adopted by the Commission must be cost-based. It would need to comply with Congress' clear focus on determining costs and ensuring cost recovery and as well as Congress' respect and provision for the role of state commissions in actually setting rates. Indeed, it could be argued that the "bill-and-keep" arrangements referenced in section 252(d)(2)(B)(i) are entirely within the purview of state commissions in the administration of their rate setting function as set forth in section 252(d)(2)(A). Indeed, that reading is reflected in the Commission's current rules.[4] Of course, simply setting a rate of zero, or eliminating per-minute charges without any functional substitute, would not comply with the plain text of the Act.

Finally, the Commission resolves to rely on transitional or interim authority as the basis for reform:

> Authority to Set a Transition Plan. In addition to our authority to reform interstate access charges, wireless termination charges, and reciprocal compensation to eliminate per-minute rates, we also believe we have authority to establish a transition plan for moving toward that ultimate objective in a manner that will minimize market disruptions. As the D.C. Circuit has recognized, avoiding "market disruption pending broader reforms is, of course, a standard and accepted justification for a temporary rule." *NPRM*, ¶ 521.

[4] 47 C.F.R. § 51.713(b). ("A state commission may impose bill-and-keep arrangements if the state commission determines that the amount of telecommunications traffic from one network to the other is roughly balanced with the amount of telecommunications traffic flowing in the opposite direction, and is expected to remain so, and no showing has been made pursuant to § 51.711(b).").

"Transitional" or "interim" authority is an important regulatory tool, but its scope is not unlimited. In order to invoke a transitional authority, the Commission must articulate a clear objective, not a possible move to bill-and-keep, a vague desire to eliminate per-minute charges,or to mimic pricing structures from the IP industry. When the Commission issued the *ISP Remand Order* in 2001, the premise of the "interim rules" was a move to bill-and-keep.[5] But the Commission later backed away from that goal, and the D.C. Circuit Court demanded an explanation through the mandamus process. While the Commission was ultimately able, in 2008, to supply a new statutory justification that did not rely on bill-and-keep, the interim period of more than seven years created considerable instability in the ICC system, as carriers disputed the terms and implementation of an "interim" order that had never undergone judicial review. This absence of judicial review and continuing reliance on interim or transitional authority severely tested accepted norms of regulatory process and the rule of law.[6]

Comments on Section XII ("CONCEPTS TO GUIDE INTERCARRIER COMPENSATION REFORM")

In Section XII, the *NPRM* condemns "a combination of intercarrier compensation rates set above incremental cost and the terminating access monopoly that exists today, which allows LECs to recover revenues through charges that cannot be disciplined by competition." *NPRM*, ¶ 524. The Commission's observation with respect to "rates set above incremental cost" provides the basis to support (1) defining "incremental cost" (assuming that term means something other

[5] *WorldCom v. FCC*, 288 F.3d 429, 431 (D.C. Cir., 2002) ("To smooth the transition to bill-and-keep (but without fully committing itself to it), the FCC adopted several interim cost-recovery rules…").

[6] *In re Core Communications, Inc.*, 531 F.3d 849, 859 (D.C. Cir., 2008) ("In granting the writ of mandamus, we do not second-guess the FCC's policy judgment to pursue a comprehensive solution to the problem of intercarrier compensation… But as we said in *MCI,* in response to a similar plea by the FCC to allow it to continue in effect rates that had been found unsupported pending the issuance of "comprehensive procedures": "[T]here must be some limit to the time tariffs unjustified under the law can remain in effect.... Otherwise, the regulatory scheme Congress has crafted becomes anarchic....")(citations omitted).

than TELRIC); and (2) setting rates at cost, or causing rates to be set at cost. However, it does not provide the basis to move ICC to a bill-and-keep system, unless there are concomitant, wide ranging changes in the retail pricing of telecommunications. Of course, the Commission has no statutory authority to implement a retail pricing transformation.

The characterization of rates set above "incremental cost" also raises the question as to which incremental costs are relevant for ICC rate setting purposes. In the context of "reciprocal compensation" the same TELRIC call termination rates initially applied regardless of whether it was the ILEC that handed-off the call to the CLEC, or the CLEC that handed-off the call to the ILEC. Since the rates were set at the ILEC's claimed incremental cost (as set by state commission in the mid- to late-1990s), an ILEC should have been indifferent as to whether it sent traffic to a CLEC or terminated traffic handed off by that CLEC. Conversely, since the CLECs were able to achieve efficiencies that permitted them to provide termination service at a lower incremental cost than the ILEC, the CLECs should have been permitted to do so and to realize additional profits therefrom.

If the competitive market were working properly and as was intended by Congress in enacting the 1996 Act, the ILEC, confronted with a lower-cost rival, would have responded by improving its own efficiency and meeting or beating the competitor's price. But rather than compete on this basis, the ILECs instead sought shelter from the regulators. Rather than compete with CLECs that were specializing in terminating ISP-bound traffic, ILECs persuaded the FCC to create a special category limited to "ISP-bound" calls and to allow the ILECs to pay a termination charge that was well below the CLEC's (and the ILEC's) incremental cost. ILECs continued to collect full local call revenue from their customers, enjoyed the ability to hand off calls to CLECs with minimal compensation, and retained those sender-paid end user revenues as

excess profits. The Commission has never characterized the ILECs' actions in this regard as "arbitrage." Yet what the ILECs did in the ISP-bound traffic context is—from an economics view—indistinguishable from "traffic pumping" and other CLEC activity to which the FCC ascribes nefarious motives.

Before placing undue reliance on the concept of a "terminating monopoly," the Commission should clearly define the problem it intends to address as well as the statutory basis for such measures. Defining "terminating monopoly" to include CLECs' provision of local exchange service to end users is irrational. CLECs by definition operate in a competitive environment, without any "safety net" in the form of universal service fund ("USF") payments or even the ability to charge subscriber line charges ("SLCs") up to the Commission's caps. CLECs enjoy no form of monopoly, terminating or otherwise. A CLEC's customer is free to switch carriers in response to the pricing and quality of competing service providers. If an ILEC believes that a CLEC is generating excess profits in its capacity as a "terminating monopoly," the ILEC may simply enter the market and to compete with the CLEC, forcing prices down.

The Commission identifies an additional basis for ICC reform when it observes that:

> Underlying historical pricing policies for termination of traffic was the assumption that the calling party was the sole beneficiary and sole cost-causer of a call. More recent analyses, however, have recognized that both parties generally benefit from participating in a call, and therefore, that both parties should share the cost of the call. *NPRM*, ¶ 525.

However, the theoretical study of who "benefits" from a call is simply not germane to a discussion of how ICC operates or how it might be reformed. As discussed above, the allocation of "benefits" in a two-sided market (i.e., one involving both a caller and a recipient of a call) is not in and of itself a sufficient basis to drive prices or pricing policy. In fact, most of the time, the caller likely derives greater benefit than the recipient since, after all, it was the caller who

made the decision to initiate, and to pay for, the call. That is not to say that the recipient may have derived no benefit, but that the recipient's benefit was probably less. In fact, in those cases where the recipient sees itself as deriving a relatively greater economic benefit, it can offer and agree to pay for the call, by using a toll-free type of service. Under the existing sender-pays pricing arrangement, those decisions are left to the customer and to the marketplace; they are not dictated by the carrier or by any regulator, nor should they be.

The *NPRM* states that "the long-term approach to intercarrier compensation reform also must be consistent with the exchange of traffic on an IP-to-IP basis." *NPRM*, ¶ 527.The Commission's reference to "a methodology that is consistent with IP networks" is both vague and misguided. IP peering, for example, only takes place between large carriers that exchange roughly equal amounts of traffic. The Level3-Comcast dispute shows the limits of the "peering" concept.[7] As that dispute demonstrates, there is no clear consensus in the IP/broadband industry regarding (1) what constitutes a peering arrangement; or (2) whether ICC should be paid for an IP-IP interconnection. While IP traffic exchange may or may not lend itself to per-minute charges, that fact is only cosmetic. IP carriers are fully capable and incented to bill one another for traffic imbalances, whether on a per-port or a per-megabit type charge.

The *NPRM* seeks comment on a "bill-and-keep methodology" in which "carriers would not impose charges on other service providers to recover the costs of transporting telephone calls from a specified point in the network or for originating or terminating those calls." *NPRM*, ¶ 530. "Instead, they would recover such costs from their own end users, possibly in conjunction with CAF support." *Id.* Bill-and-keep may well be a potential alternative to sender-pays pricing, but it is not obviously superior to sender-pays, and is incapable of solving many of the problems

[7] *See generally, e.g., Ex Parte Submission of Level3 Communications, Inc.*, GN Docket No. 09-191, WC Docket Nos. 07-52 and 10-127 (filed Dec. 3, 2010).

ascribed to the existing ICC regime. Further, bill-and-keep introduces many new problems of its own.

Bill-and-keep sends incorrect pricing signals to the sender. Bill-and-keep equates to an ICC rate of zero. Therefore the ICC payment for terminating a call (i.e., no payment) will be below the incremental cost associated with termination of that call (i.e., something greater than zero). However, setting the ICC rate at below incremental cost does not reduce the inefficiencies associated with charges that are set above incremental cost. At a zero termination charge, carriers are incented to seek out end users that generate large volumes of calls, since terminating carriers would be required to haul those calls for free. For example, if the incremental cost of a call of a given duration is 10 cents, under sender-pays pricing, the sender is charged 10 cents for the call. Assuming the market is competitive, prices will be bid down toward the 10-cent level. Using bill-and-keep, the entire cost of the call is split between caller and recipient, with the sender paying only 5 cents. Even though the decision to place the call is entirely up to him, the sender only pays for half of the cost. The recipient, who did not participate in the decision to initiate the call, and who may derive little or no actual benefit therefrom, is still "stuck" with a 5 cent charge. Confronted with a below-total-cost price, the sender is likely to overuse the service, leading to undesirable traffic flows such as spam and robo-dialer traffic. Of course, the inevitable intercarrier disputes over such traffic would generate the same kinds of "arbitrage" arguments the Commission seeks to eliminate by moving to bill-and-keep.

Bill-and-keep cannot be implemented piecemeal. To work, bill-and-keep must be implemented simultaneously at the wholesale and retail levels. The "overuse" problem just described is exacerbated in any selective implementation of bill-and-keep, such as where it is applied only at the wholesale (intercarrier) level and perhaps only to certain carriers or traffic

types. For example, local calls originated by business customers have been and continue to be subject to measured-use pricing in many large urban markets. Where flat-rate pricing is offered, it is typically set at a fairly high level so as to effectively replace the measured-use local revenue that would otherwise be available. Residential customers typically can also purchase measured-use service or pay a higher rate for flat-rate coverage. When the ILEC completes a call to its own customer, the calling party has paid the ILEC for the end-to-end call, and there is no retail charge to the recipient for the call. If the retail price (measured or flat-rate) is set so as to exactly recover the carrier's costs, the carrier is paid in full for its service and earns no more than a "normal" profit.

But what if the call recipient is served by a different LEC? In a non-zero ICC regime, the originating carrier shares a portion of its revenue with the terminating carrier via the call termination charge. However, under a bill-and-keep arrangement, the originating carrier bills its own customer for the entire call, incurs costs for only its half of the call, and keeps the additional money for itself. If the traffic in both directions is roughly in balance, these effects will roughly cancel each other out. However, where one of the carriers is in a position to specialize in serving a particular type of customer, it is unlikely that traffic will be in balance. This means the terminating carrier will lose money on each and every call it receives.

The Commission lacks the legal authority to implement bill-and-keep at the retail level. Such a fundamental revision to telecommunications policy must include state commissions, since local retail rates are generally subject to state regulation. Dominant carriers that serve a broad mix of customers (RBOCs, mid-sized ILECs, and cablecos) have no incentive to modify their retail pricing structures to reflect bill-and-keep at the wholesale level. Retaining the existing arrangement allows them to foreclose and frustrate their smaller, more specialized competitors.

This remains in effect until the terminating LEC—incumbent or competitive—is forced out of business due to a lack of revenue for the call termination service that it provides. This is anti-competitive, raises takings concerns, and threatens the financial viability of smaller carriers. Such an outcome is lethal to competitors and new entrants—the exact opposite intent of the 1996 Act.

Comments on Section XIII ("SELECTING THE PATH TO MODERNIZE EXISTING RULES AND ADVANCE IP NETWORKS")

In Section XIII, the Commission seeks comment on two alternative "paths" to achieve ICC reform:

> Under the first option, the transition would be implemented through reliance on the existing roles played by the states and the Commission with respect to regulation of rates. The Commission would reduce interstate access charges, and adopt a methodology that states would implement to reduce reciprocal compensation rates; but the categories of traffic under the reciprocal compensation framework would remain unchanged… Under the second option, the Commission would use the tools provided by sections 251 and 252 in the 1996 Act to unify all intercarrier rates, including those for intrastate calls, under the framework of reciprocal compensation. In this framework, the Commission establishes a methodology for intercarrier rates, which states then work with the Commission to implement. *NPRM*, ¶ 538.

The first option is greatly preferable in that it complies with the statutory framework and sound public policy. The second option suffers from the Commission's lack of authority over intrastate access regimes administered by state commissions. Principles of comity, too, suggest that the Commission should strive to partner with states to achieve its ICC goals, and not approach state commissions as potential saboteurs of reform.[8] In the absence of Commission action on many pressing ICC issues, states have stepped in to impose order and the rule of law in an increasingly

[8] For example, that NPRM notes that "[t]he suspension or modification provision in section 251(f)(2) could permit a state to suspend or modify the intercarrier compensation reform obligations for smaller carriers. Doing so could undermine the reforms we propose today, particularly if the Commission moves all traffic within the reciprocal compensation framework." *NPRM*, ¶ 519.

chaotic ICC landscape. Unfortunately, the Commission has not always reciprocated and in some cases has undermined states' efforts.[9]

II. REPLY COMMENTS ON SECTION XV OF NPRM

Core hereby provides its comments in response to other parties' April 1, 2011 comments with respect to Section XV of the *NPRM* ("REDUCING INEFFICIENCIES AND WASTE BY CURBING ARBITRAGE OPPORTUNITIES"). Core reserves its rights to address other parties' proposals and positions as they become more evident through *ex parte* presentations.

Interconnected VOIP

Several "over the top" VOIP providers propose bill-and-keep (by which they simply mean a rate of zero, not an offsetting of in-kind payments) for intercarrier compensation when they deliver traffic to the PSTN, so-called "interconnected VOIP" traffic.[10] Any VOIP provider would desire free interconnection with the PSTN, but a free termination rule ignores the fact that LECs supply VOIP providers with valuable network functions. LECs should be fairly compensated and both the 1996 Act and sound economics require compensation. In the typical interconnected VOIP call flow, LECs provide substantial network investment, equipment, transport, and functionality, while VOIP providers' input is minimal in comparison. The relative roles of LECs and VoIP providers in providing interconnected VoIP are depicted in the attached Exhibit A.

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[9] For example, in a case involving compensation for ISP-bound traffic exchanged between two CLECs, the Commission submitted an *amicus* brief which, for the first time, asserted FCC preemption of state commission authority over such intrastate traffic, and potentially undermined years of state commission proceedings in at least two states, California and Pennsylvania. Amicus Brief for the Federal Communications Commission in Partial Support of Plaintiff-Appellant Urging Reversal, *AT&T Comm. of California v. Pac-West Telecomm.*, U.S.C.A. for the Ninth Circuit Docket No. 08-17030, at 14 (filed February 2, 2011)("[T]he FCC's intercarrier compensation rules… have pre-emptive effect. The CPUC thus erred when it adjudicated the dispute between AT&T and Pac-West under state law…").

[10] *See, e.g.,* Comments of Vonage Holdings Corp., at 3 ("Adopting a bill-and-keep regime for Interconnected VoIP furthers the Commission's goals for intercarrier compensation reform and a transition to IP networks.").

Access Stimulation

Several commenters argue that the Commission's proposed rules to address access stimulation did not go "far enough" and want "additional triggers"[11] as well as assurances that the new rules will not foreclose additional disputes in the future.[12] These proposals would only further aggravate IXC non-payment, hyper-aggressive litigation, and unilateral self-help, all of which plague the LEC industry today. Although somewhat ambiguous, the Commission's proposed rules are at least better tailored to the issues identified in the *NPRM* than are the IXCs' proposals. If adopted, these proposals will only encourage IXCs to dispute an even wider range of LEC access billings. Creative use of the additional verbiage contained in their proposals will allow IXCs to further undermine LEC tariffs and the rule of law. Revenue flows will be threatened or eliminated on a broad front, not merely those stemming from the rural conference call traffic targeted for reform in the *NPRM*. Ultimately, many IXCs want complicated or broadly worded rules simply in order to spawn endless litigation, while they refuse to pay for services rendered, and pocket the savings. This is wrong, unfair, anticompetitive and unlawful under the Act.

[11] Comments of AT&T Inc., at 18-19 ("the Commission should adopt multiple triggers, and provide that its new, more restrictive rules apply if any of those triggers is met.")

[12] Comments of Verizon and Verizon Wireless, at 44 ("the Commission should make clear in the text of its forthcoming traffic pumping order that its new traffic pumping rules do not establish a presumption that traffic pumping and other intercarrier compensation arbitrage schemes that may fall outside of the four corners of those rules are considered legitimate and consistent with section 201(b) of the Act. 47 U.S.C. § 201(b). In addition, the Commission should also establish a presumption that a revenue sharing arrangement exists, and the new triggering mechanism is engaged, if a predominant share of a LEC's billed intercarrier compensation minutes are routed to or from conferences bridges, information services such as chat lines, or other known traffic stimulation mechanisms regardless of whether the LEC and the other providers are affiliated.").

Respectfully Submitted,

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